# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD TALTON,

Defendant-Appellant.

UNPUBLISHED
June 25, 2002

No. 231986
Wayne Circuit Court
LC No. 00-002866

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to twenty to forty years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

The prosecution alleged that after defendant's wife informed him that the victim, Jimmy Halsell, had made improper advances toward her, defendant went to the home where Halsell was visiting and shot him once in the neck. Defendant claimed that he was suffering from diminished capacity at the time.

On appeal, defendant first argues that the trial court committed error requiring reversal and denied defendant due process under US Const, Am VI, XIV; Const 1963, art 1, § 17, when it inadequately responded to the deliberating jury's question about how the law defines the term "ordinary person" for purposes of the crime of voluntary manslaughter. We disagree.

Claims of instructional error are reviewed de novo. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). A trial court is required to charge the jury concerning the law applicable to the case. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). The instructions to the jury must include all elements of the crime charged and must not exclude from jury consideration material issues, defenses, or theories if there is evidence to support them. *Id*. This Court will not find error if the jury instructions fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant. *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001); *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000).

In the instant case, when the court instructed the jury on the lesser offense of voluntary manslaughter, it followed the language of the standard criminal jury instruction, CJI2d 16.9(2),[1] with one exception: the court substituted the term "ordinary person" for "reasonable person." When the deliberating jury sent the court a note asking for reinstruction on diminished capacity and for a definition of "ordinary person," the court instructed the jury over defense objection[2] in pertinent part as follows:

> The question was, what does the law define as an ordinary person, if any. I don't want you to assign any special meaning to any of these words. The same is true with what I just read to you. Just give the words their regular meaning, the meanings that you assign to them in your everyday dealings. There's nothing special about any of these definitions. You use the same definitions that you use in your every day business transactions and your everyday life, and that goes for the instruction that I read to you.

On appeal, defendant presents three facets of alleged error relating to the above instruction: (1) that the trial court erred in using the term "ordinary person" as opposed to "reasonable person" when instructing the jury regarding the appropriate standard to be used in determining whether defendant was sufficiently provoked to reduce his possible conviction to voluntary manslaughter; (2) that the trial court erred in failing to define "ordinary person" when the jury asked for a definition of that term; and (3) that the court's instruction was erroneous because it did not advise the jury to take into account defendant's mental or emotional state in assessing whether adequate provocation existed.

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[1] CJI2d 16.9(2) states:

> First, when the defendant acted, [his/her] thinking must be disturbed by emotional excitement to the point that a reasonable person might have acted on impulse, without thinking twice, from passion instead of judgment. This emotional excitement must have been the result of something that would cause a reasonable person to act rashly or on impulse. The law doesn't say what things are enough to do this. That is for you to decide.

[2] Defense counsel explained the underlying basis of his objection as follows:

> My position is that not only is it, as with self-defense, you take the facts as that person finds them, et cetera, that it is both an objective, when you're talking about a reasonable person instruction that it's both an objective standard and a subjective standard. That you take the facts as that person saw them, that you take whatever disability that person has and then you judge them by the general standards of the community, whether or not those were appropriate or inappropriate, whether they're things that should be considered, i.e., that it's not just simply an ordinary person standard, but there's to a certain extent, a certain empathy involved with putting one's self in the shoes of the defendant in terms of the problems . . . of that case. The court refused. Your Honor, I object to that, to what you instructed them with respect to an ordinary, what an ordinary person standard is. Thank you.

The record reflects that at trial defendant did not pose an objection to the trial court's instruction on the basis of the first two grounds.[3] Thus, we review these unpreserved appellate claims for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *Knapp, supra* at 375; *McCrady, supra* at 29. We conclude that plain error did not occur. The terms "ordinary person" and "reasonable person" have been used interchangeably and synonymously in the context of the offense of manslaughter. See *People v Younger*, 380 Mich 678, 681; 158 NW2d 493 (1968) ("Manslaughter . . . is a homicide which is not the result of premeditation, deliberation and malice but, rather, which is the result of such provocation that an *ordinary man* would kill in the heat of passion before a reasonable time had elapsed for the passions to subside and reason to resume its control." (Emphasis added.)); *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991) ("the provocation [necessary to mitigate a homicide from murder to manslaughter] must be adequate, namely, that which would cause the *reasonable person* to lose control." (Emphasis added.)) Moreover, this Court has held error requiring reversal does not occur as a result of a trial court's failure to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension. *Knapp, supra* at 377. The term "ordinary person" falls within this category. Thus, the trial court's failure to use one term and not the other, and its alleged failure to further define the term "ordinary person," do not constitute plain error. *Carines, supra*; *Knapp, supra*.

With regard to the heart of defendant's argument – that the trial court's complained-of instruction was deficient because it erroneously failed to inform the jury to take into account defendant's mental or emotional state in assessing whether adequate provocation existed and to evaluate the adequacy of the provocation by a subjective standard – defendant acknowledges that in *People v Sullivan*, 231 Mich App 510, 518-520; 586 NW2d 578 (1998), aff'd 461 Mich 992; 609 NW2d 193 (2000), this Court held that a defendant's special traits, including mental and emotional disorders, may not be considered in determining the adequacy of the provocation. Rather, a reasonable person standard governs. *Id*. Thus, this Court has expressly rejected defendant's claim and we find it to be meritless.

Next, defendant contends that his conviction must be reversed because the trial court erroneously instructed the jury that defendant had the burden of proving the defense of diminished capacity by a preponderance of the evidence and then declined to explain the applicable standard. Defendant admits that although his attorney objected at trial that the court's instructions did not adequately define the term "preponderance of the evidence" or distinguish it from the concept of "proof beyond a reasonable doubt," his counsel did not object to that aspect of the instruction advising the jury about the burden of proof. Thus, we review this allegation for plain error. *Carines, supra*.

Defendant maintains that diminished capacity was a recognized defense at the time of his trial and that once he introduced evidence of diminished capacity, the burden was on the prosecution to prove that the defendant was not so incapacitated; thus, the trial court's jury instructions impermissibly shifted the burden of proof from the prosecution to the defense. Defendant candidly notes that recently in *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), the Michigan Supreme Court held that a diminished capacity defense based on lack of

[3] See text, *supra* at p 2, n 2.

mental capacity short of insanity is not a viable defense. Defendant argues, nonetheless, that *Carpenter* should not be applied retroactively to his case because to do so would violate the ex post facto prohibitions of both the United States and Michigan Constitutions. US Const, art I, § 10, cl 1; art I, § 9, cl 3; and Const 1963, art 1, § 10. We disagree.

In *People v Doyle*, 451 Mich 93, 99; 545 NW2d 627 (1996), our Supreme Court noted that the Ex Post Facto Clause does not apply directly to the judiciary. However, ex post facto principles are applicable to the judiciary by analogy through the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id*. at 100. As the *Doyle* Court explained, *id*.:

> [R]etroactive application of a judicial decision will only violate due process when it acts as an ex post facto law. An ex post facto law has been defined by the United States Supreme Court as one "'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,' or 'that *aggravates a crime*, or makes it *greater* than it was, when committed.'" *Bouie* [*v City of Columbia*, 378 US 347; 84 S Ct 1697; 12 L Ed 2d 894 (1964)], *supra* at 353 (emphasis in original). As a result of the due process analogy, it has been stated that "an unforeseeable *judicial enlargement* of a criminal statute, applied retroactively, operates precisely like an *ex post facto law* . . . ." *Id*. at 353 (emphasis added). "The retroactive application of an *unforeseeable* interpretation of a criminal statute, if detrimental to a defendant, generally violates the Due Process Clause." *Hagan v Caspari*, 50 F3d 542, 545 (CA 8, 1995) (emphasis added).

The *Doyle* Court further noted that

> "[T]he general rule is that judicial decisions are to be given complete retroactive effect. . . . [C]omplete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986). If a judicial decision is "unexpected" and "indefensible" in light of the law existing at the time of the conduct, retroactive application of such a decision is problematic.
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> . . .we hold that . . . where a precisely drafted statute, unambiguous on its face, is interpreted by this Court for the first time, there has not been a "change" in the law. Where the Legislature has passed an unambiguous statute, that statute is the law. Our role is to enforce the law as written. [*Id*. at 104, 113.]

In *Carpenter*, *supra*, the Court construed MCL 768.21a,[4] which took effect in 1975. 1975 PA 180. The Court originally granted leave to consider whether the lower courts properly

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[4] MCL 768.21a provides:

(continued…)

determined that it was the defendant's burden to establish his diminished capacity defense by a preponderance of the evidence under MCL 768.21a. However, the *Carpenter* Court was

> persuaded by the prosecution's argument that, by enacting a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation, the Legislature has signified its intent not to allow a defendant to introduce evidence of mental abnormalities short of legal insanity to avoid or reduce criminal responsibility by negating specific intent. [*Id.* at 226.]

Thus, in lieu of deciding whether a defendant in a criminal case has the burden of proving a diminished capacity defense, the *Carpenter* Court ultimately abolished the defense altogether as it pertained to a lack of mental capacity short of legal insanity.

In so doing, the *Carpenter* Court noted that the viability of the diminished capacity defense as a form of the statutory insanity defense had been suggested by a series of Court of Appeals cases, *id*. at 233-235, and while the Supreme Court itself had "several times acknowledged in passing the concept of the diminished capacity defense," see e.g., *People v Lloyd*, 459 Mich 433; 590 NW2d 738 (1999), *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), and *People v Griffin*, 433 Mich 860; 444 NW2d 139 (1989), it has "*never specifically authorized its use in Michigan courts*." *Id*. at 232-233 (emphasis added).

The *Carpenter* Court held that the statutory language was clear and conclusive:

> [W]e agree with the prosecution that our Legislature, by enacting the comprehensive statutory framework described above, has already conclusively determined when mental incapacity can serve as a basis for relieving one from criminal responsibility. We conclude that, through this framework, the Legislature has created an all or nothing insanity defense. Central to our holding is the fact that the Legislature has already contemplated and addressed situations involving persons who are mentally ill or retarded yet not legally insane. As noted above, such a person may be found "guilty but mentally ill" and must be sentenced in the same manner as any other defendant committing the same

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(…continued)

> (1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. . . .
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> (2) An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.
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> (3) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

> offense and subject to psychiatric evaluation and treatment. MCL 768.36(3). Through this statutory provision, the Legislature has demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent. [*Id*. at 237.]

We conclude that retroactive application of *Carpenter* to defendant herein does not violate the Ex Post Facto Clauses of the state and federal constitutions or implicate any due process concerns. As previously noted in *Doyle, supra* at 113, "where a precisely drafted statute, unambiguous on its face, is interpreted by [the Supreme] Court for the first time, there has not been a 'change' in the law." The *Carpenter* case presents such a scenario. As the Supreme Court noted in *Carpenter, supra* at 235-236, "there is no indication in § 21a that the Legislature intended to make diminished capacity an affirmative defense." Furthermore, the *Carpenter* Court addressed a question of statutory interpretation that had neither been previously decided at that level, *Doyle, supra* at 103, nor, for that matter, in the Court of Appeals cases cited therein which, in other contexts, recognized the diminished capacity defense. See *Carpenter, supra* at 232-235. Consequently, in light of *Carpenter's* applicability to the present case, the trial court's instructions to the jury regarding diminished capacity did not constitute plain error requiring reversal.

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot